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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

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No. 817

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WILLIAM A. BROWN, et al.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals,
For the Sixth Circuit.**

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William A. Brown, Joseph H. Ferrill and Margaret Ferrill, Frank H. Abbott and Dorothy G. Abbott, Grady C. Dixon and Joyce S. Dixon, Alfred C. Brandon Jr., and Louise M. Brandon pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on July 29, 1968.

## CITATIONS TO OPINIONS BELOW.

The opinion of the Tax Court of the United States is reported in 47 T. C. 399, and is printed in Appendix B, *infra*, p. A-3. The opinion of the United States Court of Appeals is reported in 398 F. 2d 832, and is printed in Appendix D, *infra*, p. A-26.

## JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 29, 1968 (p. A-26, *infra*). A timely petition for rehearing (Appendix E, p. A-28, *infra*) filed on August 12, 1968, was denied on September 12, 1968 (Appendix F, p. A-33, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

## QUESTIONS PRESENTED.

I. Whether income may be constitutionally taxed where it stems from financial assistance received by petitioners from fellow members of an employee association under a mutual aid agreement and based on a pay-as-you-go policy so that surplus funds are refunded when the need ceases and which required petitioners to make similar contributions to other members involved in another work stoppage as well as fellow members of the same company as themselves.

II. Whether petitioners received non-taxable gifts from the financial assistance received through an employee association which had a mutual aid, pay-as-you-go policy and which was received for a period extending for as long as six months after the termination of a strike.

III. Was the decision of the Tax Court based upon an erroneous view of the law and clearly erroneous in the ultimate findings of fact.

## STATUTES INVOLVED.

The statutory provisions involved are: the 16th Amendment to the United States Constitution, sections 61 (a) and 102 of the Internal Revenue Code of 1954, 26 U. S. C., sections 61 and 102. They are printed in Appendix A, *infra*, pp. A-1—A-2.

## STATEMENT OF THE CASE.

The jurisdiction of the Tax Court was invoked because the case arises under the Internal Revenue Code. The Commissioner of Internal Revenue issued statutory notices of deficiencies to the petitioners herein asserting a tax due from the inclusion in taxable income of amounts received by the petitioners through the Air Line Pilots Association. By timely petitions filed in the Tax Court, the petitioners contended that the amounts received did not constitute taxable income within the meaning of the XVI Amendment of the United States Constitution, or in the alternative, that the facts, as hereinafter summarized, justified a conclusion that the amounts received were gifts and hence not taxable.

During the year 1960, the male petitioners (hereinafter referred to as the petitioners) were employed as airline pilots by Southern Airways, Inc., a regularly scheduled commercial airline (hereinafter called "Southern") and were based in Memphis, Tennessee. The female petitioners are parties herein only because they filed joint returns with their husbands.

During the years 1960 and 1961, each of the petitioners, with the exception of William A. Brown, was an active member of the Air Line Pilots Association (hereinafter called "ALPA"), a non-profit, employee-representing association with its home office located in Chicago, Illinois, and affiliated with the American Federation of Labor—

Congress of Industrial Organization. ALPA was the certified collective bargaining representative for pilots at Southern.

Under the Constitution and By-Laws of ALPA, dues to ALPA are paid by active members only. Apprentice members of ALPA do not pay dues and do not assume any financial obligations to ALPA. They are excluded from rights and privileges of ALPA. They may attend local council meetings but may not vote.

On June 5, 1960, after a dispute arose between Southern and ALPA, the petitioners, along with other pilots employed by Southern, went out on strike. The strike continued until September 21, 1962, and during that time and until March, 1963, the petitioners received financial assistance **through** ALPA pursuant to ALPA's Policy manual.

The amount of assistance received by each petitioner varied and was based on a formula established by ALPA policy prior to the strike. Strike assistance was also received by non-members of ALPA (including petitioner Brown) in accordance with the existing ALPA policy. Strike assistance was received regardless of whether the pilot obtained other type of work or had other financial resources. Petitioner Brown and other apprentice members were not required to become active members of ALPA in order to receive strike benefit assistance.

The dues paid by the ALPA members were for its normal operating expenses and **did not include any amount for emergency programs**, such as strike benefit assistance. Neither ALPA nor the local council had any fund on hand for strike benefit assistance.

Financial assistance for members (or non-members) who may be involved in a strike is provided through the levying of special assessments on all the other members of ALPA in accordance with the established ALPA

policy and whenever the need arises and after approval of the ALPA Board of Directors. Under the Constitution and By-Laws of ALPA and its Policy Manual, assessments are "levied for each major benefit program on a pay-as-you-go basis". One of the objects of ALPA is "to consider and if desirable **establish a mutual aid plan for members of the Association**". The amount of each member's obligation for a strike assessment is determined by ALPA and is based on a percentage of the member's dues **so as to equate the assessments to be received with the benefits to be disbursed.**

The funds accumulated for the benefit of the petitioners (and other striking Southern pilots) were paid by ALPA members of other air lines who were not engaged in any work stoppage. A member of ALPA may voluntarily decline to pay any assessment made by ALPA. In that event, he would forfeit his membership in ALPA, but such loss of membership would have no effect on his employment status with his particular air line employer.

In June, 1962, at the biennial meeting, ALPA adopted a resolution to continue paying strike benefits to the Southern pilots until two months after they returned to work and were placed on the payroll.

After the strike terminated on September 21, 1962, there was a period of two to four months before all the petitioners herein were able to requalify under Federal Aviation Agency regulations as pilots and return to the Southern payroll. As a consequence of the ALPA resolution (adopted in June, 1962), three petitioners herein continued to receive assistance from ALPA until sometime in January, 1963, and the other two petitioners continued to receive assistance until sometime in March, 1963, although they were placed on the Southern payroll in November, 1962 and January, 1963, respectively.

After each petitioner returned to flight pay status, he was assessed by ALPA for strike benefits that were cur-

rently payable to other Southern pilots who had not yet returned to flight pay status and for the two-month period thereafter, in accordance with the established ALPA policy and the special resolution. **Upon being placed on the company payroll, the petitioners were actually receiving assistance and contributing funds for strike benefits to fellow pilots simultaneously.**

Also, during the strike with Southern, petitioners (with the exception of William A. Brown) were assessed for assistance payable to pilots of Northwest Airlines, who were furloughed during 1960 and 1961 because of a dispute between Northwest Airlines and the International Association of Machinists. Payment of the assessments by these petitioners was deferred until they had returned to flight pay status, in accordance with ALPA policy.

Upon termination of the need for financial assistance, **surplus funds in possession of ALPA** from assessments levied for said program **were refunded to contributing members.**

The evidence before the Tax Court showed without dispute that ALPA did not require members to picket or perform any other activity in furtherance of the strike in order to continue receiving strike benefit assistance.

There were instances of financial assistance being paid even though petitioners and other striking pilots did not actively support the strike effort, *e. g.*, during the strike period: petitioner Brandon was engaged as a flying instructor and operating an air charter service, petitioners Dixon and Ferrill jointly operating a hardware and sporting goods store, petitioner Abbott returned to college, another striking pilot went on active military duty.

On January 18, 1967, the Tax Court filed its findings of fact and opinion that the strike benefits constituted gross income to the petitioners within the meaning of

the Sixteenth Amendment to the Constitution and section 61 (a) of the Internal Revenue Code of 1954 and are not excludable from gross income as gifts under section 102 (a) of the Code. On February 24, 1967, the Tax Court entered its decision that there were deficiencies in income tax owing by the petitioners and entered orders to that effect.

On May 22, 1967, petitioners filed their Notice of Appeal and Petition for Review.

On July 29, 1968, the judgment of the Tax Court was affirmed by the United States Court of Appeals for the Sixth Circuit. A timely petition for rehearing was denied on September 12, 1968.

The petitioners pray that this Court grant their petition for certiorari and upon review that the judgments and decisions of the lower courts be reversed.

## REASON FOR GRANTING THE WRIT.

There are approximately 100 other taxpayers who were involved in the identical labor dispute and who now have tax cases pending in the various levels of the Internal Revenue Service awaiting the outcome of this test case. In addition, there are approximately 1,000 other taxpayers who, as members of the Air Lines Pilots Association, were involved in later labor disputes and who are indirectly interested in the outcome of this case since they are concerned with the same issue.

The petitioners contend that the sums of money they received through the Air Line Pilots Association (ALPA) do not constitute taxable income within the meaning of the Sixteenth Amendment of the United States Constitution or within the definition of gross income as stated in Section 61 (a) of the Internal Revenue Code.

Under Section 61 (a) of the 1954 Internal Revenue Code, the income tax is imposed on taxable income. Petitioners contend, however, that the receipt of the strike benefits **through** ALPA under the circumstances set out herein are not receipts that may constitutionally be taxed.

There are no controlling decisions which may be cited as authority for deciding the issue involved herein. In the only case in which this Court considered the question of the taxability of strike benefits, **United States v. Kaiser** (1960), 363 U. S. 299, 5 AFTR 2d 1611, it held that the strike benefits paid to the taxpayer **by the union** were gifts and consequently non-taxable. However, the facts and circumstances of this case are so unique as to clearly distinguish it from **Kaiser** and the few other cases involving this issue.

ALPA's benefit policy applies to situations where simultaneous work stoppages occur on two or more air lines. ALPA policy is to assess the entire membership, including the members of each group engaged in a work stoppage, for amounts due members of the other group, with the proviso, that payment of an assessment by members engaged in a work stoppage may be deferred until after the member has returned to flight pay status.

It is significant to note that the aforementioned ALPA policy was given effect in the taxable years involved herein in two situations. During the period of the Southern strike, pilots of Northwest Air Lines were furloughed, not from a strike of ALPA pilots, but due to a labor dispute involving Northwest Air Lines and International Association of Machinists. Four of the five petitioners herein, being members of ALPA, were duly assessed for benefits due the pilots of Northwest Air Lines. Petitioner Brown, not being a member of ALPA, was not assessed. In accordance with ALPA policy, the payment of the assessments by the four petitioners herein was deferred until they returned to flight pay status.

In the second instance, the petitioners herein were also assessed (in accordance with ALPA policy) for contributions to the financial assistance of other Southern pilots who had not yet returned to the Southern payroll as well as for the two months subsequent thereto, as provided in the special ALPA resolution. As a consequence, the Southern pilots, including petitioners herein, **were assessed for benefits due other Southern pilots who had not yet returned to work and for the two-month period thereafter, while they simultaneously received strike benefit assistance.**

Petitioners declare that the unique facts in this case establish the existence of an association of air line pilots in which the members are willing to come to the aid of each other in certain defined situations. The petitioners contend that the **mutual aid policy of their association is analogous to an unfunded self-insurance program or a fraternal beneficiary society, and that receipts from fellow members of such an organization and under such circumstances as exist herein do not constitute taxable income.**

The petitioners contend, in the alternative, that the facts of this case are sufficient to conclude that the amount of financial assistance they received through ALPA were gifts within the meaning of Section 102 of the Internal Revenue Code.

There was no existing fund on hand which was previously accumulated for the purpose of paying strike benefits. **The entire program is conducted on a pay-as-you-go basis** and, when the strike is terminated, **surplus funds are returned to the contributing members.**

ALPA did not require petitioners to picket or perform any other duties in order to receive strike benefits. Furthermore, the Policy Manual stated that strike benefits are not subject to setoff against other earnings except

from approved activity with an airline. As a consequence, several petitioners were engaged in other businesses during the period of the strike and they received the same amount of benefits which ALPA policy prescribed. Other striking pilots who were ordered to active duty in the U. S. Navy and Air Force during the period of the strike and as well as after the strike also received the same amount of strike benefits which ALPA policy prescribed.

In June, 1962, prior to the termination of the strike, ALPA, again by special resolution for the benefit of the Southern pilots, voted to continue the payment of financial assistance beyond the date of the conclusion of the strike **for a period of two months after their return to the company payroll.** Accordingly, due to the unique circumstances involved herein, some of the pilots, including some of the petitioners, **continued receiving financial assistance for as long as six months after the strike terminated.**

The evidence clearly shows: that the ALPA policy provided for mutual assistance in the event of simultaneous work stoppages; that strike benefits were not subject to set-off against other earnings except for earnings from approved activity with the affected carrier; that the strike benefits did not terminate on September 21, 1962, when the strike was concluded; that the strike benefits were received by some of the petitioners up to March, 1963, which was two months after they returned to the Southern payroll and approximately six months after the strike terminated.

The strike benefit assistance received by petitioners herein was not "compensation from refraining from labor" as suggested by the Tax Court. Such a hypothesis would indicate that petitioners were willing to forego their regular compensation for flying planes for Southern (for which they received up to $1,125 salary per month) in

order to receive "compensation for refraining from labor" for which they received a maximum of $650 per month when the strike commenced. It is obvious that if a pilot had preferred to continue flying for Southern, he would not be eligible (under the ALPA Constitution and Policy Manual) to receive strike benefits since he was not on strike. Such strike benefit assistance was not paid in lieu of wages.

Tax Court decisions are to be reviewed in the same manner as the decisions of the District Courts in civil actions tried without a jury. Sec. 7482, Internal Revenue Code of 1954; Rule 52 (a), Federal Rules of Civil Procedure, 28 U. S. C. The Tax Court findings of fact are not binding upon this Court if there is no substantial evidence to sustain them, if they are against the clear weight of the evidence, or if they are induced by an erroneous view of the law.

In applying this rule in **McAllister v. United States** (1954), 348 U. S. 19, 20, 75 S. Ct. 6, 8, 99 L. Ed. 20, the Supreme Court enunciated the following test:

> "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed,' **United States v. Oregon (State) Medical Society**, 343 U. S. 326, 339 (72 S. Ct. 690, 698, 96 L. Ed. 978); **United States v. United States Gypsum Co.**, 333 U. S. 364, 395 (68 S. Ct. 525, 541, 92 L. Ed. 746)."

The Tax Court made inconsistent findings of fact when it found, on the one hand, that payment of strike benefits to striking pilots was "contingent upon their refraining from flying for the airline involved in a strike and upon their active support of the strike effort through performance of any duties, including picketing, which may be

assigned by local leadership", and, on the other hand, that "the policy manual of ALPA, as adopted by its governing bodies, provides for the payment of strike benefit assistance to all pilots . . . who are deprived of their airline income due to (a) being involved in processing a properly authorized strike; (b) a furlough or lockout by management arising directly from ALPA's efforts to resolve a dispute; or (c) the implementation of ALPA policy by a group of members or by ALPA".

In the first instance, it appears that the Tax Court based its finding of the basis for paying strike benefits on inferences stemming from personal statements of witnesses in a deposition unattended by opposing counsel. In the second instance, the Tax Court based its finding of the basis for paying strike benefits from the exact language of the ALPA policy manual.

As a further inconsistent finding of the basis for receiving strike benefit payments from ALPA, the Tax Court found that "all of such pilots, including all of the petitioners were required to withhold their services from, and refrain from flying for, Southern during the strike". There is no evidence to support such a conclusion.

Further support for the finding of fact that picketing and active support of the strike effort were not required in order to receive strike benefits are: (1) The Tax Court found that the chairman did not require the performance by the striking pilots of any picketing or related duties; (2) ALPA did not require members to picket or perform any other activity in furtherance of the strike in order to continue receiving strike benefit assistance; (3) several instances of strike benefits being paid to the petitioners and other striking pilots even though they did not actively support the strike effort through the performance of any duties were found by the Tax Court, *e. g.* petitioner Brandon being engaged as a flying instructor and operating an

air charter service, petitioners Dixon and Ferrill jointly operating a hardware and sporting goods store, petitioner Abbott returning to college and in another instance, a striking pilot went on active military duty during the period of the strike.

## CONCLUSION.

For the foregoing reasons, your petitioners respectfully pray that this petition be granted, and that this Court's writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit for the purpose of reviewing the questions hereinbefore specified, and that upon review, the judgment and decision of the United States Tax Court and the United States Court of Appeals for the Sixth Circuit be reversed, and that your petitioners have such other and further relief as this Honorable Court may deem just.

Respectfully submitted,

R. MONROE SCHWARTZ,
P. O. Box 1398,
Atlanta 1, Georgia,
Counsel for Petitioners.

### Certificate of Service.

It is hereby certified that two copies of this Petition have been served upon Hon. Erwin N. Griswold, Solicitor General, United States Department of Justice, and two copies on Hon. Lester R. Uretz, Chief Counsel of the Internal Revenue Service by first class mail with postage prepaid.

This 6th day of December, 1968.

R. Monroe Schwartz.

# APPENDIX.

## APPENDIX A.

### Statutes Involved.

**United States Constitution:**

**Amendment XVI.**

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

**Internal Revenue Code of 1954:**

**Sec. 61. Gross Income Defined.**

(a) General Definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

**Sec. 102. Gifts and Inheritances.**

(a) General Rule—Gross income does not include the value of property acquired by gift, . . .

**28 U. S. C., Federal Rules of Civil Procedure:**

**Rule 52. Findings by the Court.**

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . . Findings of fact shall not be set aside unless clearly erroneous . . .

## APPENDIX B.

47 T. C. No. 38.

Tax Court of the United States.

William A. Brown, et al.,[1] Petitioners v. Commissioner of Internal Revenue, Respondent.

Docket Nos. 3947-62, 2050-63, 2562-63
2659-63, 2660-63, 2661-63

Filed January 18, 1967.

The petitioners, six airline pilots for Southern Airways, Inc., went out on strike against the airline in June 1960, and during 1960 and 1961 received strike benefit payments from their union, Air Line Pilots Association. Five of the petitioners were active members and one was an apprentice member of the association. The benefits were paid pursuant to an established schedule or formula, based upon the pilot's preceding year's airline income, and were paid from assessments made by the association against member pilots of other airlines who were not engaged in any work stoppage. A minimum requirement for receipt of the benefits was that the recipient refrain from flying the planes of the airline. Payment of the benefits was not conditioned upon the pilot's need. **Held**, that the strike payments constituted gross income within the meaning of the Sixteenth Amendment to the Constitution and section 61 (a) of the Internal Revenue Code of 1954, and are not excludable from gross income as gifts under section 102 (a) of the Code.

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[1] Cases of the following petitioners are consolidated herewith: Robert E. Owens, Jr., and Elizabeth D. Owens, Docket No. 2050-63; Joseph H. Ferrill and Margaret Ferrill, Docket No. 2562-63; Frank H. Abbott and Dorothy G. Abbott, Docket No. 2659-63; Grady C. Dixon and Joyce S. Dixon, Docket No. 2660-63; and Alfred C. Brandon, Jr., and Louise M. Brandon, Docket No. 2661-63.

**Held, further,** that any underpayment of tax resulting from failure of the petitioners to report the benefits as income was not due to negligence or intentional disregard of rules and regulations within the meaning of section 6653 (a) of the Code, and that the petitioners are therefore not liable for additions to tax under that section.

**R. Monroe Schwartz,** for the petitioners.

**Vallie C. Brooks,** for the respondent.

Atkins, **Judge.** The respondent determined deficiencies in the petitioners' income taxes as follows:

| Docket Number | Petitioner | Taxable Year | Deficiency | Addition to Tax Sec. 6653 (a) I. R. C. 1954 |
|---|---|---|---|---|
| 3947-62 | William A. Brown | 1960 | $ 558.22 | |
| 2050-63 | Robert E. Owens, Jr. and Elizabeth D. Owens | 1960 | 526.01 | |
| 2562-63 | Joseph H. Ferrill and Margaret Ferrill | 1961 | 946.76 | $47.33 |
| 2659-63 | Frank H. Abbott and Dorothy G. Abbott | 1960 | 998.49 | 49.93 |
| 2660-63 | Grady C. Dixon and Joyce S. Dixon | 1960 | 929.71 | 26.09 |
| 2661-63 | Alfred C. Brandon, Jr. and Louise M. Brandon | 1960 | 365.51 | 18.28 |
| | | 1961 | 1,263.41 | 63.18 |

The respondent having conceded error with respect to one of the issues in Docket No. 2659-63, the only issues remaining for decision herein are: (1) whether strike benefit payments received by the petitioners during the taxable years in issue are includable in their gross in-

come, and (2) whether the petitioners in Docket Nos. 2562-63, 2659-63, 2660-63, and 2661-63 are liable for additions to tax for the taxable years in issue on account of negligence or intentional disregard of rules and regulations.

**Findings of Fact.**

Some of the facts have been stipulated and the stipulations are incorporated herein by this reference.

All of the petitioners filed their Federal income tax returns for the taxable years involved herein with the district director of internal revenue, Nashville, Tennessee. The female petitioners are parties herein only because they filed joint returns with their husbands, and the male petitioners will hereinafter be referred to as the petitioners.

During the years 1960 and 1961 the petitioners were employed as airline pilots by Southern Airways, Inc., a regularly scheduled commercial airline (hereinafter referred to as Southern) and were based in Memphis, Tennessee.

The certified collective bargaining representative at Southern is the Air Line Pilots Association (hereinafter referred to as ALPA). ALPA is a nonprofit, employee-representing association with its home office located at Chicago, Illinois, and is affiliated with the American Federation of Labor-Congress of Industrial Organization. Some of ALPA's objectives, as set forth in its constitution, are to establish and exercise the right of collective bargaining for the purpose of making and maintaining employment agreements covering rates of pay and working conditions for its members, and to generally safeguard the rights, individually and collectively, of its members. ALPA consists of a Pilots Division and a Steward and Stewardesses Division, each of which divisions is fiscally separate,

self-sustaining, and makes and implements its separate policies.

The administrative structure of ALPA consists of a board of directors, an executive committee, an executive board, master executive councils, local councils, and local executive councils. The board of diretors is the highest governing body of ALPA and is vested with the general management and conduct of its business affairs. It is composed of high officials from all of the local councils. The executive committee and the executive board are responsible for the implementation of the policies announced by the directors. A master executive council is formed for each airline represented by ALPA, and functions as a coordinating council for the membership of that airline. Local councils of ALPA are established in various cities for each airline when a majority of all flight deck operating crew members employed on such airline in a particular city are active members of ALPA in good standing. Each local council has a local executive council which is responsible for the proper management of the business of the local council.

In June 1960 the Southern pilots had two local councils: Council 112 in Atlanta and Council 74 in Memphis. These two local councils were controlled by the master executive council for Southern. During the years 1960 and 1961 each of the petitioners, with the exception of William A. Brown, was an active member of the Memphis local council 74 of ALPA. Brown was an apprentice member of such council. An active member of ALPA is any pilot who has completed a required one year probationary period with his company and is voted into the organization by the active members of the local council. Such members accept and agree to abide by the constitution and by-laws of ALPA. An apprentice member is any pilot who possesses all of the requirements for active membership with the exception of having completed the required probationary period.

Dues are paid by active members only. The amount thereof is, at the election of the member, either a percentage of his annual airline income for the previous year or a flat rate based on his flight status. Apprentice members do not pay dues and do not assume any financial obligations to ALPA. They are excluded from rights and privileges of the association. They may attend local council meetings, but may not vote.

The constitution of ALPA provides that any member may be fined, suspended, or expelled, for, among other things, disobeying or failing to comply with a decision of the board of directors, the executive board, the executive committee, the master executive council, or the local council, or for refusing or willfully neglecting to pay dues, assessments, fines or financial obligations to ALPA.

The policy manual of ALPA specifically provides that any member who participates in strike breaking by actually flying the planes of an airline involved in a strike shall be automatically expelled from membership. The policy manual of ALPA, as adopted by its governing bodies, provides for the payment of strike benefit assistance to all pilots (when certified by the local executive council), whether members, nonmembers, or apprentice members, who are deprived of airline income due to (a) being involved in processing a properly authorized strike; (b) a furlough or lock-out by management arising directly from ALPA's efforts to resolve a dispute; or (c) the implementation of ALPA policy by a group of members or by ALPA. Payment of strike benefits to striking pilots is contingent upon their refraining from flying for the airline involved in a strike and upon their active support of the strike effort, through performance of any duties, including picketing, which may be assigned by local leadership.

Dues paid to ALPA cover its normal operating expenses, but do not include any amount for emergency

programs, such as strike benefit assistance. Financial assistance for members who may be involved in a properly authorized strike is provided through the levying of special assessments on all members of ALPA. A strike assessment must be approved by the board of directors. The amount of each member's obligation for a strike assessment is determined by ALPA and is based on a percentage of the member's dues for the preceding calendar year. A member of ALPA may decline to pay any assessment made by ALPA at any time, in which event he would forfeit his membership in ALPA, but such loss of membership would generally have no effect on his employment status with his particular airline employer. Local Council 74 did not maintain any fund for strike benefit assistance.

In 1960 Southern's pilots voted to strike the company following a dispute over work rules and wages, and the ALPA board of directors voted to pay strike benefits to them in the event a strike took place. Subsequently, on June 5, 1960, the petitioners, together with all of the other airline pilots of Southern, with the possible exception of one or two pilots holding management positions, went out on strike against Southern. The strike was authorized by the master executive council of Southern and approved by ALPA's president in accordance with the provisions of the ALPA constitution.

The chairman of the local executive council for Memphis Council 74 certified the petitioners and other Southern strikers in the Memphis area for strike benefits in advance of payment. The chairman did not require the performance by the striking pilots of any picketing or related duties, but all of such pilots, including all of the petitioners, were required to withhold their services from, and refrain from flying for, Southern during the strike in order to receive strike benefit payments from ALPA.

During the first 117 days of the strike, Southern was completely grounded in Memphis, and did not operate any flights in and out of Memphis during such period. However, after such period Southern began to operate flights in and out of Memphis, and the striking pilots were polled to determine what each felt he was best qualified to do to help the strike effort and keep Southern from flying. As a result of such poll, various pilots did various duties in aid of the strike effort, including picketing.

In August 1960 ALPA entered into an agreement with Valparaiso Aero Service, Inc., for the operation of an airline known as Superior Air Lines, during the strike to compete with Southern over Southern's most lucrative routes in order to take business from Southern and advance the strike effort. Under the agreement ALPA was to furnish the personnel, including pilots. Some of the striking Southern pilots contributed their services to Superior as part of the strike effort, receiving no compensation other than meals and out-of-pocket expenses. Superior's operations ceased about November 1962, having resulted in losses in excess of $100,000 which were sustained by ALPA pursuant to its guarantee given to Valparaiso. The strike benefits paid to the petitioners herein and to other Southern strikers were not affected by the fact that they did or did not act as pilots for Superior.

ALPA imposed no requirement that strikers prove monetary need in order to receive such benefits, nor were any food vouchers distributed or personal obligations of strikers paid by ALPA. The policy manual provided that strike benefits were not subject to set-off against other earnings except for earnings from approved activity with the affected carrier during the shutdown.

During a part of the strike period petitioner Brandon obtained work as a flying instructor and operated an air charter service, and petitioners Dixon and Ferrill jointly

operated a hardware and sporting goods store. In accordance with the provisions of the ALPA policy manual the strike benefits received by them were not reduced on account thereof. During the course of the strike the petitioner Abbott returned to college, but continued to receive strike benefits.

At the biennial meeting of the board of directors of ALPA in June 1962, a resolution was adopted to continue paying strike benefits to the Southern pilots until two months after they returned to work and were placed on Southern's payroll. The resolution stated, in part, as follows:

> Whereas the Southern strike and its attendant problems appears to be drawing to a conclusion in a manner favorable to ALPA and to the Southern pilots, and
>
> Whereas there still has been no "back to work" contract negotiated, and
>
> Whereas an orderly and smooth return of ALPA pilots to Southern cockpits may take time and may not be done "en masse," and
>
> Whereas the long and orderly strike of the Southern pilots has contributed future value to all air line pilots in all future negotiations,
>
> Therefore Be It Resolved this Board of Directors extend its congratulations to these men and to strengthen their resolve in this matter, and
>
> Be It Further Resolved that in accordance with present ALPA policy on an individual basis the Southern MEC be empowered to continue payments for two months after return to work—return to work will be the date the pilot is placed on the payroll, and
>
> Be It Further Resolved that the ALPA publicly extend its heartfelt thanks and respect to these members for their strong and firm stand for the beliefs of ALPA.

The ALPA strike against Southern was terminated on September 21, 1962, but due to the length of the strike the striking pilots were required to requalify as pilots under Federal Aviation Agency regulations, so that there was a period of from two to four months following the conclusion of the strike before the petitioners were able to requalify as pilots and thereby become eligible to be placed on flight pay status. Accordingly, as a result of the above ALPA resolution and the requalification requirements, the petitioners Abbott, Dixon, and Ferrill continued to receive strike benefits until January 1963, while the petitioners Brandon, Brown, and Owens received such benefits until March 1963.

After each petitioner returned to flight pay status, he, along with other Southern pilots who were members of ALPA and who had returned to flight pay status (including the petitioner William A. Brown who became an active member of ALPA at the termination of the strike), was assessed by ALPA for benefits payable to other Southern pilots who had not yet returned to flight pay status with Southern.[2] The funds from which strike benefits were paid to the petitioners and other striking Southern pilots consisted of amounts paid by ALPA member pilots of other airlines who were not engaged in any work stoppage, pursuant to assessments made against them by ALPA. Upon termination of the strike at Southern, surplus funds in possession of ALPA from assessments for strike benefits in connection with the strike were refunded to contributing members.

The strike benefit payments made by ALPA to each of the petitioners were made pursuant to an established

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[2] During their strike against Southern, the petitioners (with the exception of William A. Brown) were assessed for benefits payable to pilots of Northwest Airlines, Inc., who were furloughed by said airline during 1960 and 1961 because of a dispute between Northwest Airlines and the International Association of Machinists, but payment of these assessments was deferred until the petitioners had returned to flight pay status.

schedule or formula set forth in the ALPA policy manual, based upon the recipient's preceding year's airline income, with certain maximum and minimum limitations. Under the provisions in existence at June 5, 1960, the benefits were payable beginning with the 8th day of the strike.

The following tabulation shows the annual salaries of the petitioners from Southern just prior to the strike and the amounts of strike benefits paid to them in cash by ALPA during the period June 5, 1960 to December 31, 1960, and during the entire year 1961:

| | Annual Salary Prior to Strike | Strike Benefits Paid in 1960 | Strike Benefits Paid in 1961 |
|---|---|---|---|
| William A. Brown | $ 4,800.00 | $2,561.33 | ..... |
| Robert E. Owens, Jr. | 6,600.00 | 2,538.07 | ..... |
| Joseph H. Ferrill | 11,000.00 | ..... | $7,511.04 |
| Frank H. Abbott | 13,500.00 | 4,548.42 | ..... |
| Grady C. Dixon | 13,500.00 | 4,411.35 | ..... |
| Alfred C. Brandon, Jr. | 11,000.00 | 2,415.27 | 5,910.90 |

Prior to filing their income tax returns for the taxable year 1960 the striking Southern pilots attempted to obtain information as to the taxability of the strike benefits. One of them, C. A. Stokes (not a petitioner herein) who was by education an attorney, requested the advice of J. R. Goldthwait, Jr., an Atlanta attorney. On February 16, 1961, Goldthwait sent a letter to Stokes advising him that in view of certain cited court decisions involving strike benefits and the action of the Government with regard thereto, it was his opinion that the striking pilots would be justified in taking the position that strike benefits are nontaxable and should not be reported as income. Copies of such letter were circulated by Stokes to all striking pilots of Southern.

On November 1, 1961, Maurice B. Wigderson, an attorney on ALPA's legal staff, addressed a letter to V. A.

Knudegard, the master executive council chairman for Southern, advising him, in answer to his inquiry, that in his opinion the strike benefits received by the Southern pilots constituted gifts. Such opinion was made available to all Southern pilots.

The petitioners did not report any of the strike benefits received from ALPA in 1960 and 1961 on their Federal income tax returns for such years. In the notices of deficiency, the respondent included the above amounts in the petitioners' adjusted gross incomes, with the statement that the strike benefit payments from ALPA are taxable as ordinary income under section 61 of the Internal Revenue Code of 1954.

The strike benefits received by the petitioners in the taxable years 1960 and 1961 did not constitute gifts.

In the notices of deficiency sent to the petitioners in Docket Nos. 2562-63, 2659-63, 2660-63, and 2661-63, the respondent determined additions to tax under section 6653 (a) of the Code, on the ground that parts of the underpayments of tax determined for the taxable years 1960 and 1961 were due to negligence or intentional disregard of rules and regulations.

No part of any underpayment in tax determined by the respondent in Docket Nos. 2562-63, 2659-63, 2660-63, and 2661-63 was due to negligence or intentional disregard of rules and regulations.

**Opinion.**

The petitioners contend that the strike benefit payments received by them do not constitute income within the meaning of the Sixteenth Amendment to the United States Constitution and the definition of gross income contained in section 61 (a) of the Internal Revenue Code

of 1954.[3] Alternatively, they contend that the strike benefit payments constituted gifts within the meaning of section 102 of the Code, and are therefore not includable in gross income.[4]

The respondent, on the other hand, maintains that the strike benefit payments received by the petitioners are properly includable in gross income under section 61 (a) of the Code, and that they are not excludable from gross income as gifts.

The petitioners' principal reliance is upon the definition of income contained in **Eisner v. Macomber**, 252 U. S. 189, namely, "the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets." It appears to be the petitioners' contention that the strike benefits received did not derive from any of these enumerated sources. They claim that ALPA did not require them to picket or perform any other duties in order to receive these strike benefits.

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[3] The Sixteenth Amendment provides:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Section 61 (a) provides in part as follows:

> (a) General Definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commissions, and similar items;
>
> (2) Gross income derived from business;
>
> * * * * * * *

[4] Section 102 (a) of the Code provides:

> (a) General Rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

While the chairman of the local executive council testified that he did not require the performance by the striking pilots of any picketing or related duties in connection with this strike, the record establishes that ALPA had the authority to require the performance of such services as a condition to the payment of strike benefits, and the evidence shows that the pilots were polled to determine what they were best qualified to do to help the strike effort, as a result of which many of them did picket and perform other duties, including flying for an airline set up by ALPA in competition with Southern. It is also clear from the evidence that a minimum requirement for receiving the strike benefits was that the pilots refrain from flying Southern's planes. It is well established that compensation from refraining from labor is taxable income no less than compensation for services to be performed. **Salvage v. Commissioner** (C. A. 2), 76 F. 2d 112, affd. 297 U. S. 106. See also **John N. Hagar**, 43 T. C. 468.

Furthermore, in **Commisioner v. Glenshaw Glass Co.**, 348 U. S. 426, the Supreme Court held that Congress, in providing in section 22 (a) of the Internal Revenue Code of 1939 that gross income includes "gains or profits and income derived from any source whatever" intended to exert the full measure of its power to tax income. The Court further stated that the definition of gross income contained in **Eisner v. Macomber**, *supra*, "was not meant to provide a touchstone to all future gross income questions." In the **Glenshaw Glass** case the Court, in holding that punitive damages received for fraud and anti-trust violations constituted gross income, pointed out that there were "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." See also **General American Investors Company, Inc. v. Commissioner**, 348 U. S. 434. The petitioners herein, by receiving the strike benefits, realized accessions

to wealth which they were free to use as they saw fit, and we think there can be no question that such benefits constituted income within the meaning of the Constitution, and also within the meaning of section 61 (a)[5] of the Code unless, as contended by the petitioners, the benefits constituted gifts which are specifically excluded from gross income by the provisions of section 102 (a) of the Code.

In **Commissioner v. Duberstein,** 363 U. S. 278, the Supreme Court stated that the question of whether an amount received constitutes a gift within the meaning of the statute is basically one of fact, stating in part:

> The course of decision here makes it plain that the statute does not use the term "gift" in the common-law sense, but in a more colloquial sense. This Court has indicated that a voluntary executed transfer of his property by one to another, without any consideration or compensation therefor, though a common-law gift, is not necessarily a "gift" within the meaning of the statute. For the Court has shown that the mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift. Old Colony Trust Co. v. Commissioner, 279 U. S. 716 [7 AFTR 8875]. And, importantly, if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature, Bogardus v. Commissioner, 302 U. S. 34, 41 [19 AFTR 1195], it is not a gift. And, conversely, "[w] here the

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[5] While the language of section 61 (a) of the Internal Revenue Code of 1954 differs slightly from that of section 22 (a) of the Internal Revenue Code of 1939, Congress made it clear that such change did not affect the all-inclusive nature of statutory gross income; that the definition of gross income was based upon the Sixteenth Amendment to the Constitution; and that the word "income" was used in its constitutional sense. See H. Rept. No. 1337, 83d Cong., 2d Sess., p. A. 18.

payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it". Robertson v. United States, 343 U. S. 711, 714 [41 AFTR 1053]. A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," Commissioner v. LoBue, 351 U. S. 243, 246 [49 AFTR 832]; "out of affection, respect, admiration, charity or like impulses." Robertson v. United States, supra, at 714. And in this regard, the most critical consideration, as the Court was agreed in the leading case here, is the transferor's "intention." Bogardus v. Commissioner, 302 U. S. 34, 43 [19 AFTR 1195]. "What controls is the intention with which payment, however voluntary, has been made."

The strike benefits paid by ALPA to the petitioners herein did not proceed from a detached and disinterested generosity or out of charity or like impulses. The benefits paid to the individual pilots were not conditioned upon need, but were paid pursuant to an established schedule or formula based upon the receipient's preceding year's airline income. Such payments were made in furtherance of the objectives of ALPA, namely, to obtain anticipated economic benefits for all its pilot members. As pointed out hereinabove, there was consideration given by the striking pilots—a minimum requirement for receipt of the benefits was that the recipient refrain from flying Southern's airplanes. It would also seem that ALPA had at least a moral obligation to pay the strike benefits to the petitioners as the result of the action of its board of directors in voting, prior to the strike, to pay such benefits if the strike was carried out. Under the circumstances, we are constrained to conclude that the benefits in question are not excludable from gross income as gifts. We note that in **Godwin v. United States** (W. D. Tenn.), ... F. Supp. ..., the court

directed a verdict that strike benefits received from ALPA by a Southern pilot in connection with this same strike were income rather than gifts. See also **Woody v. United States** (C. A. 9), ... F. 2d ..., affirming (D. C., Ore.) ... F. Supp. ...; **John N. Hagar,** *supra*; and **Halsor v. Lethert** (D. C., Minn.), 240 F. Supp. 738, in which it was held that under the circumstances there involved strike benefits constituted taxable income.

In **United States v. Kaiser,** 363 U. S. 299, the Supreme Court held that a jury had acted within its competence in finding that certain payments made by a labor union to a striker constituted gifts. The Court again emphasized the basically factual nature of the question. There the taxpayer went out on strike and found himself in financial need. He was not a union member but went to the union headquarters and requested assistance. It was the policy of the union to grant assistance to the strikers simply on a need basis, whether or not the striker was a union member, and to cease giving assistance to strikers who obtained work. The union representatives questioned the taxpayer as to his financial resources and his dependents. The taxpayer had no other job and needed assistance with respect to the essentials of life. The union provided him with a food voucher for $6 per week (later increased to $7.50 per week), redeemable in kind at a local store, and also paid his room rent amounting to $9 per week. The Supreme Court there stated in part:

> Our opinion in Duberstein stresses the basically factual nature of the inquiry as to this issue. The factual inferences to be drawn from the basic facts were here for the jury. They had the power to conclude, on the record, taking into account such factors as the form and amount of the assistance and the conditions of personal need, of lack of other sources of income, compensation, or public assistance, and

> of dependency status, which surrounded the program under which it was rendered, that while the assistance was furnished only to strikers, it was not a recompense for striking. They could have concluded that the very general language of the Union's constitution, when considered with the nature of the Union as an entity and with the factors to which we have just referred, did not indicate that basically the assistance proceeded from any constraint of moral or legal obligation, of a nature that would preclude it from being a gift. And on all these circumstances, the jury could have concluded that assistance, rendered as it was to a class of persons in the community in economic need, proceeded primarily from generosity or charity, rather than from the incentive of anticipated economic benefit. * * *

Suffice it to state that the situation in the instant case is significantly different from that obtaining in the **Kaiser** case. There the assistance was given because of the recipient's needs and was earmarked for the payment of his essentials of life, namely, food and rent. Here the payments were made irrespective of need and irrespective of other sources of income, and without any restrictions as to use.

The respondent also contends that the petitioners in Docket Nos. 2562-63, 2659-63, 2660-63, and 2661-63 are liable for additions to tax for the taxable years in issue under section 6653 (a) of the Code,[6] on account of neg-

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[6] Section 6653 (a) provides:

> Negligence or Intentional Disregard of Rules and Regulations With Respect to Income or Gift Taxes.—If any part of any underpayment (as defined in subsection (c) (1)) of any tax imposed by subtitle A or by chapter 12 of subtitle B (relating to income taxes and gift taxes) is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment.

ligence or intentional disregard of rules and regulations in failing to report strike benefits received as income.[7]

Prior to filing their returns for the taxable years 1960 and 1961, the striking Southern pilots attempted to obtain information as to the taxability of the strike benefits. As the result of the solicitation of one of their members they, including the petitioners, were in receipt of a letter from an attorney in which he expressed the opinion that, in view of certain court decisions involving strike benefits and the action of the Government with regard thereto, they would be justified in taking the position that strike benefits are nontaxable and need not be reported as income. The opinion letter itself would indicate to the reader that the attorney rendering the opinion was familiar with the factual situation involved and with the then existing cases dealing with the taxability of strike benefits. While, as indicated hereinabove, we are in disagreement with the legal opinion upon which the petitioners relied, we cannot conclude that their reliance thereon was unreasonable. Under the circumstances, it is our conclusion that any underpayment of tax due to failure to report the strike benefits as taxable income was not due to negligence or intentional disregard of rules and regulations, within the intendment of section 6653 (a). We accordingly hold that the petitioners are not liable for additions to tax under such section.[8]

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[7] On brief the respondent states that his failure to determine section 6653 (a) additions to tax against the petitioners in Docket Nos. 3947-62 and 2050-63 was due to an oversight. The respondent chose not to raise this issue affirmatively at the trial with respect to the above two docket numbers.

[8] We note that in **Godwin v. United States**, supra, an addition to tax under section 6653 (a) was approved upon the finding of the jury that the taxpayer was negligent in failing to include the strike benefits on his income tax return. However, upon the basis of the evidence presented in the instant case, we are satisfied that the underpayments resulting from failure to include the strike benefits as income were not due to negligence or intentional disregard of rules and regulations.

Decisions will be entered for the Respondent in Docket Nos. 3947-62 and 2050-63.

Decisions will be entered for the Respondent in Docket Nos. 2562-63, 2660-63, and 2661-63, except to the extent he determined additions to the tax under section 6653 (a).

Decision will be entered under Rule 50 in Docket No. 2659-63.

## APPENDIX C.

William A. Brown,
Petitioner,
v.
Commissioner of Internal Revenue,
Respondent.
} Docket 3947-62.

### Decision.

Pursuant to the Findings of Fact and Opinion of the Court filed January 18, 1967, it is

Ordered and Decided: That there is a deficiency in income tax for the taxable year 1960 in the amount of $558.22.

/s/ Craig S. Atkins,
Judge.

Entered: Feb. 24, 1967.

Joseph H. Ferrill and Margaret Ferrill,
Petitioners,
v.
Commissioner of Internal Revenue,
Respondent.
} Docket 2562-63.

### Decision.

Pursuant to the Findings of Fact and Opinion of the Court filed January 18, 1967, it is

Ordered and Decided: That there is a deficiency in income tax for the taxable year 1961 in the amount of

$946.76, and that there is no addition to tax due for the taxable year 1961, under section 6653 (a) of the Internal Revenue Code of 1954.

/s/ Craig S. Atkins,
Judge.

Entered: Feb. 24, 1967.

Frank H. Abbott and Dorothy G. Abbott,
Petitioners,
v.
Commissioner of Internal Revenue,
Respondent.
} Docket 2659-63.

**Decision.**

Pursuant to the Opinion of the Court filed January 18, 1967, and the agreed computation of the tax liability filed by the parties, it is

Ordered and Decided: That there is a deficiency in income tax due from the petitioners for the taxable year 1960 in the amount of $984.21; and

That there is no addition to the tax due from the petitioners for the taxable year 1960, under the provisions of section 6653 (a) of the Internal Revenue Code of 1954.

/s/ Craig S. Atkins,
Judge.

Entered: Feb. 21, 1967.

Grady C. Dixon and Joyce S. Dixon,
Petitioners,

v.

Commissioner of Internal Revenue,
Respondent.

Docket 2660-63.

**Decision.**

Pursuant to the Findings of Fact and Opinion of the Court filed January 18, 1967, it is

Ordered and Decided: That there is a deficiency in income tax for the taxable year 1960 in the amount of $929.71, and that there is no addition to tax due for the taxable year 1960, under section 6653 (a) of the Internal Revenue Code of 1954.

/s/ Craig S. Atkins,
Judge.

Entered: Feb. 24, 1967.

Alfred C. Brandon, Jr., and Louise M. Brandon,
Petitioners,

v.

Commissioner of Internal Revenue,
Respondent.

Docket 2661-63.

**Decision.**

Pursuant to the Findings of Fact and Opinion of the Court filed January 18, 1967, it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years 1960 and 1961 in the

amounts of $265.51 and $1,263.41, respectively, and that there are no additions to tax due for the taxable years 1960 and 1961, under section 6653 (a) of the Internal Revenue Code of 1954.

/s/ Craig S. Atkins,
Judge.

Entered: Feb. 24, 1967.

## APPENDIX D.

No. 18013.

United States Court of Appeals
For the Sixth Circuit.

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William A. Brown, Joseph H. Ferrill, Margaret Ferrill, Frank H. Abbott, Dorothy Abbott, Grady C. Dixon, Joyce S. Dixon, Alfred C. Brandon, Jr., and Louise M. Brandon,
Petitioners-Appellants,

v.

Commissioner of Internal Revenue,
Respondent-Appellee.

} Petition for Review of the Decision of the Tax Court of the United States.

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Decided July 29, 1968.

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Before O'Sullivan, Phillips and Peck, Circuit Judges.

Per Curiam. This case involves deficiencies in income taxes determined against the taxpayers for the years 1960 and 1961.

The taxpayers, airline pilots of Southern Airways, Inc., went on strike in June 1960 and during 1960 and 1961 received strike benefit payments from their union, Air Line Pilots Association. The Commissioner determined that the amounts of strike benefits received by the taxpayers were includable in gross income.

In an opinion published at 47 T. C. 399, the Tax Court held that the strike payments constitute gross income

within the meaning of the Sixteenth Amendment and Section 61 (a) of the Internal Revenue Code and are not excludable from gross income as gifts under Section 102 (a) of the Code. The Tax Court found that the strike benefits were paid pursuant to an established formula, based upon each pilot's airline income for the preceeding year, and were paid from assessments made by the association against member pilots who were not engaged in any work stoppage. A minimum requirement for the receipt of benefits was that the recipient refrain from flying the planes of the airline. The Tax Court further found that payment of benefits was not conditioned upon the needs of the pilot.

We hold that the findings of fact of the Tax Court are not clearly erroneous, but to the contrary are supported by substantial evidence.

The decision of the Tax Court is affirmed for the reasons set forth in the reported opinion of that Court.

## APPENDIX E.

### PETITION FOR REHEARING.

The petitioners respectfully petition this Court to grant a rehearing with respect to its decision of July 29, 1968, affirming the decision of the Tax Court of the United States that held that the receipt of strike benefits constituted gross income within the meaning of the Sixteenth Amendment of the United States Constitution and section 61 (a) of the Internal Revenue Code and are not excludable from gross income as gifts under section 102 (a) of the Code.

The petitioners respectfully submit that the Court appears to have overlooked or misapprehended the following significant and uncontroverted facts which strongly and clearly justify the conclusion that such receipts are not income within the meaning of the Sixteenth Amendment and are excludable as gifts under section 102 (a) of the Code.

1. The dues paid by the members of ALPA (Air Line Pilots Association) were for its normal operating expenses and did not include any amount for emergency programs, such as strike benefit assistance (40a, 41a).*

2. ALPA had no fund on hand prior to the time strike benefits were paid (25a).

3. The local council maintained no fund for strike benefit assistance (27a, 41a).

4. Financial assistance for members (or non-members) who may be involved in a strike is provided through the levying of special assessments on all the other members

* References are to pages in petitioner's brief and appendix.

of ALPA in accordance with the established ALPA policy and whenever the need arises (10a, 14a, 15a, 23a, 24a, 41a) and after approval of the ALPA Board of Directors (23a, 24a, 41a).

5. Under the Constitution and By-Laws of ALPA and its Policy Manual, assessments are "levied for each major benefit program on a pay-as-you-go basis" (14a).

6. One of the objects of ALPA is "to consider and if desirable establish a mutual aid plan for members of the Association" (10a).

7. The amount of each member's obligation for a strike assessment is determined by ALPA and is based on a percentage of the member's dues (10a, 23a, 41a) so as to equate the assessments to be received with the benefits to be disbursed (19a, 34a).

8. Upon termination of the need for strike benefits, **surplus funds** in possession of ALPA from assessments levied for strike benefits **were refunded** to contributing members (44a, 45a).

9. During the period of the strike, some of the pilots (including petitioners) engaged in various types of work, operated businesses, or returned to college without any diminution of strike benefits from ALPA in accordance with ALPA policy (14a, 34a, 42a, 43a).

10. Also, during the strike with Southern, petitioners (with the exception of William A. Brown) were assessed for benefits payable to pilots of Northwest Airlines, who were furloughed during 1960 and 1961 because of a dispute between Northwest Airlines and the International Association of Machinists (44a).

11. Payment of the assessments by these petitioners was deferred until they had returned to flight pay status, in accordance with ALPA policy (15a, 44a).

12. There were instances of strike benefits being paid even though petitioners and other striking pilots did not actively support the strike effort, e. g., petitioner Brandon was engaged as a flying instructor and operating an air charter service (Stip. par. 33), petitioners Dixon and Ferrill jointly operating a hardware and sporting goods store (43a), petitioner Abbott returned to college (32a, 43a), another striking pilot went on active military duty during the strike (34a).

13. The evidence before the Tax Court (as reflected in paragraphs 9 and 12, supra) showed, without dispute, that ALPA did not require members to picket or perform any other activity in furtherance of the strike in order to continue receiving strike benefit assistance (20a, 28a).

14. In June, 1962, at the biennial meeting, ALPA adopted a resolution to continue paying strike benefits to the Southern pilots **until two months after they returned to work** and were placed on the payroll (15a, 16a, 43a).

15. After the strike terminated on September 21, 1962, there was a period of two to four months before all the petitioners herein were able to requalify as pilots and return to the Southern payroll (29a, 44a).

16. As a consequence of the ALPA resolution (adopted in June, 1962), three petitioners herein continued to receive strike benefits from ALPA until sometime in January, 1963, and the other two petitioners continued to receive strike benefits until sometime in March, 1963, although they were placed on the Southern payroll in November, 1962 and January, 1963, respectively (34a, 35a, 44a).

17. After each petitioner returned to flight pay status, he was assessed by ALPA for strike benefits that were currently payable to other Southern pilots who had not yet returned to flight pay status and for the two-month

period thereafter, in accordance with the established ALPA policy and the special resolution (29a, 30a, 35a).

18. Upon being placed on the company payroll, the petitioners were actually **receiving** strike benefits and **contributing** funds for strike benefits to fellow pilots **simultaneously** (30a).

The petitioners urge that full consideration of the facts in this case clearly indicate that there are no legal precedents on the determination of the issue before the Court, i. e., subjecting the type of receipts involved herein to the income tax.

It was not the intent of the 16th Amendment to authorize the Federal Government to lay an income tax upon everything of value that came into the ownership of the potential taxpayer. The common understanding of the word "income" is the amount which one has gained by his transaction or activity. **His gains, not his gross receipts, are his constitutionally taxable income.** Cf. **Pedone v. United States** (Ct. Cl. 1957), 151 F. Supp. 288, 51 AFTR 645.

The petitioners respectfully submit that this Court's affirming the Tax Court's finding that: "A minimum requirement for the receipt of benefits was that the recipient refrain from flying the planes of the airline", is without basis in fact and contrary to the evidence.

The finding of the Tax Court to the effect that "all of such pilots, including all of the petitioners, were required to withhold their services from, and refrain from flying for, Southern during the strike in order to receive strike benefits from ALPA" is erroneous and inconsistent with the correct basis for paying strike benefits, which does not contain such conditions (12a, 13a, 14a) and which basis the Tax Court also found (40a, 42a, 43a).

The Tax Court's adoption of the erroneous and inconsistent finding is predicated on an erroneous assump-

tion that strike benefits are payable (a) in lieu of wages lost due to the strike, or (b) as compensation for refraining from work. Such a finding by the Tax Court is clearly erroneous since it is not supported by substantial evidence and is incongruous since the inference implies that the petitioners would prefer remaining on strike in order to receive strike benefits which are only a fraction of their regular wages.

It is inescapable, as disclosed by the uncontroverted facts in this case that the so-called "strike benefits" do not originate with ALPA but come from fellow-members; that said fellow-members are similarly assisted should the occasion present itself (which experience did occur, paragraph 10, supra); and that the petitioners were receiving strike benefits and contributing funds for fellow-members for the same purpose simultaneously. Furthermore, the facts also reveal the receipt of such benefits from fellow-members for a period of approximately **six months after the strike terminated** and four months after they returned to work.

The procedures and policies of ALPA provide substantial evidence and conclusive proof that these receipts do not constitute taxable income within the meaning of the Sixteenth Amendment or that a gift was intended and that such receipts are excludable from gross income under section 102 (a) of the Internal Revenue Code.

**Conclusion.**

For the foregoing reasons, we respectfully submit that this petition for rehearing should be granted.

This 9th day of August, 1968.

R. Monroe Schwartz,
Counsel for Petitioners.

## APPENDIX F.

No. 18,013.

United States Court of Appeals
For the Sixth Circuit.

William A. Brown, et al.,
Petitioners-Appellants,
v.
Commissioner of Internal Revenue,
Respondent-Appellee.

Order.

Before O'Sullivan, Phillips and Peck, Circuit Judges.

Upon consideration, it is ordered that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 817

WILLIAM A. BROWN, ET AL., PETITIONERS,

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The opinions below, the basis for this Court's jurisdiction and the statutes involved are adequately set forth in the petition.

### QUESTION PRESENTED

Whether amounts petitioners received as strike benefit payments, under the facts and circumstances of record, constitute taxable income to them within the meaning of Section 61(a) of the Internal Revenue Code of 1954.

### STATEMENT

Petitioners are six airline pilots who were employed by Southern Airways, Inc. ("Southern") during

the years 1960 and 1961.[1] The certified collective bargaining representative at Southern was the Air Line Pilots Association ("ALPA"). (Pet. App. 5.) Each petitioner, with the exception of William A. Brown, was an active member of the Memphis local council 74 of ALPA. Brown was an apprentice member of that council. (Pet. App. 6.)

In 1960, Southern's pilots voted to strike the company following a dispute over work rules and wages, and the ALPA board of directors voted to pay strike benefits to them if a strike occurred; the strike began on June 5, 1960. (Pet. App. 8.)

The policy manual of ALPA provided for the payment of strike benefit assistance to all pilots (whether members, nonmembers, or apprentice members) deprived of airline income due to involvement in processing a properly authorized strike. Payment of benefits to striking pilots is contingent upon their refraining from flying for the airline involved and upon their active support of the strike effort, through performance of any duties, including picketing, which may be assigned by the local leadership. The constitution of ALPA provides that any member may be fined, suspended, or expelled, for refusing to obey such an assignment of strike duties. (Pet. App. 7.)

The chairman of the local executive council for Memphis Council 74 certified petitioners for strike benefits in advance of payment. The chairman did not require the performance by the striking pilots of any picketing or related duties, but all of such pilots, in-

[1] The female petitioners are parties only because they filed joint returns with their husbands.

cluding petitioners, were required to withhold their services from, and refrain from flying for, Southern during the strike in order to receive strike benefit payments from ALPA. (Pet. App. 8.) Many pilots, however, did perform duties in the strike effort, including picketing. (Pet. App. 9.)

ALPA imposed no requirement that strikers prove monetary need in order to receive such benefits, nor were any food vouchers distributed or personal obligations of strikers paid by ALPA. Several of the petitioners received compensation from other activities during the strike and, in accordance with the provisions of the ALPA policy manual, the strike benefits received by them were not reduced on this account. (Pet. App. 9–10.)

The strike benefit payments made by ALPA to each of the petitioners were made pursuant to an established formula based upon the recipient's preceding year's airline income. The strike benefits paid to petitioners ranged from a low of $2,415.27 to petitioner Brandon in 1960 to a high of $7,511.04 to petitioner Ferrill in 1961. (Pet. App. 11–12.) [2]

The Tax Court upheld the Commissioner's determination that the strike benefits constituted gross income within the meaning of Section 61(a) of the 1954 Code and were not excludable as gifts under Section 102(a). The court of appeals affirmed *per curiam*, concluding that the findings of the Tax Court were "supported by substantial evidence." (Pet. App. 26–27.)

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[2] Petitioners received a total of approximately $30,000 in strike benefits during the years 1960 and 1961. (Pet. App. 12.)

ARGUMENT

The issue presented was correctly decided by both courts below. There is no conflict of decisions and further review by this Court is therefore inappropriate.

1. This Court held in *United States* v. *Kaiser,* 363 U.S. 299, that whether strike benefits are to be included in taxable income or excluded as a gift under Section 102(a) is a question of fact, dependent upon whether such benefits proceed from a "detached and disinterested generosity." See *Commissioner* v. *LoBue,* 351 U.S. 243, 246. The critical inquiry in this regard is the "dominant reason" for the transfer. *Commissioner* v. *Duberstein,* 363 U.S. 278, 286. See also *Robertson* v. *United States,* 343 U.S. 711, 714. Under these decisions, considerable weight is to be given to the factfinder's conclusions in this area and appellate review of such determinations is restricted to whether the facts as found by the trial court are "clearly erroneous." *Commissioner* v. *Duberstein, supra,* 363 U.S. at 289–291. Here, the evidence amply supports the Tax Court's conclusion (Pet. App. 17) and the court of appeals' affirmance that, under the circumstances, "the benefits in question [were] not excludable from gross income as gifts." Further review of this question is unwarranted *Comstock* v. *Group of Investors,* 335 U.S. 211, 214; *Rudolph* v. *United States,* 370 U.S. 269, 271.

In *Kaiser,* a jury verdict which concluded that strike assistance by a labor union constituted non-taxable gifts was sustained. Unlike the situation in *Kaiser,* however, the benefits in the instant case were neither conditioned upon need nor paid in the form of rent and

food vouchers. While several of the petitioners received compensation from other employment in addition to strike benefits, the policy of the union in *Kaiser* was to cease giving assistance to strikers who obtained work. Accordingly, it is clear that all of the recipients in *Kaiser* needed assistance with respect to the essentials of life. As a result, this Court held that (363 U.S. 299, 304) "the jury could have concluded that assistance, rendered as it was to a class of persons in the community in economic need, proceeded primarily from generosity or charity, rather than from the incentive of anticipated economic benefit."

The record here demonstrates the correctness of the findings of both courts below that the strike benefits received by petitioners were not gifts. The reason for the payment of the substantial cash benefits at issue was not charitable in nature, but to further the objectives of ALPA, *i.e.*, to obtain anticipated economic benefits for all of its member pilots through a successful termination of the Southern strike. No recipient had to establish economic need in order to qualify for strike benefits. The amount of benefits was solely a function of the recipient's previous year's income. Moreover, a necessary requirement for receipt of the benefits was that the recipient refrain from flying Southern's airplanes. Compensation for refraining from labor is no less taxable income than compensation for services to be performed. *Salvage* v. *Commissioner*, 76 F. 2d 112 (C.A. 2), affirmed, 297 U.S. 106.[3] Although ALPA did not

[3] Petitioners' argument (Pet. 12) that they were not required to refrain from flying for Southern during the strike in order to receive benefits is at odds with the clearly stated ALPA policy. Petitioners had to strike to receive the benefits in ques-

require the particular pilots involved in this strike to picket or perform other strike duties as a condition to the payment of the strike benefits, it had the authority to impose such requirements and any pilot who refused could be denied further benefits.[4] Indeed, many of the Southern pilots did perform such duties, including the operation of a rival airline established by ALPA to compete with Southern. (Pet. App. 15.) In the light of this evidence, the finder of fact was at the least not impelled to find that the strike benefits paid to petitioners proceeded from generosity or charity within the meaning of *Kaiser*, so as to warrant treatment as excludable gifts. See also *Woody* v. *United States*, 368 F. 2d 668 (C.A. 9); *Hagar* v. *Commissioner*, 43 T.C. 468; *Halsor* v. *Lethert*, 240 F. Supp. 738 (Minn.); and *Godwin, et al.* v. *United*

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tion. Had any of the pilots flown for Southern during the strike, they would not have been "involved in processing a properly authorized strike" within the meaning of the ALPA policy manual. (Pet. App 7.)

[4] Contrary to petitioners' contentions (Pet. 11–12), the Tax Court did not make inconsistent findings on this point. While the ALPA policy manual does not expressly condition the receipt of strike benefits upon performance of strike duties, the ALPA constitution provides that failure to comply with an order of the local council, including, for example, the performance of strike duties, could result in expulsion. (Pet. App. 7.) The consequence of expulsion was a termination of benefits if assigned duties were not performed because nonmembers had to perform specific duties in order to receive benefits. (See Record Appendix to the Commissioner's Brief in the court of appeals, p. 28b.) It is these potential sanctions, rather than the lack of any explicit requirements to picket or to perform any related functions as a prerequisite to receipt of strike benefits, which are incompatible with a charitable motive. *Hagar* v. *Commissioner*, *infra*, p. 485.

*States* (W.D. Tenn.), decided December 15, 1964 (65–1 U.S.T.C., par. 9121), all of which hold that, under similar circumstances strike benefits constituted taxable income rather than gifts. Indeed, *Halsor* and *Godwin* involved ALPA strike benefits, and the latter case arose out of the very strike in which petitioners took part.

2. Petitioners' contention (Pet. 7–9) that the amounts they received from ALPA were not gross income in either the statutory or constitutional sense (under the Sixteenth Amendment) are contrary to the decided cases of this Court. Section 61(a) of the 1954 Code defines gross income as "all income from whatever source derived." The broad phrase "from whatever source derived" is common to both Section 61(a) and the Sixteenth Amendment and was used by Congress to exert "the full measure of its taxing power." *Helvering* v. *Clifford,* 309 U.S. 331, 334; *Helvering* v. *Midland Life Ins. Co.,* 300 U.S. 216, 223; *Douglas* v. *Willcuts,* 296 U.S. 1, 9. As this Court held in *Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426, 431, gross income includes all "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion," a description that amply encompasses petitioners' strike benefits. See also *Gen. Investors Co.* v. *Commissioner,* 348 U.S. 434.

3. Finally, there is no merit to petitioners' argument (Pet. 8–9) that the benefits in question are analogous to a self-insurance program funded by assessments upon ALPA members, and should not be included in gross income for that reason. Even assum-

ing *arguendo* that the payments to petitioners could be deemed to have been received from individual ALPA members, rather than, as the record indicates, from ALPA itself, they would nevertheless be taxable unless Congress specifically excluded them from gross income.[5] Since no such statutory exclusion covers the strike benefits in the instant case, they must be included in petitioners' gross income.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] The only exclusion that Congress has seen fit to grant insurance proceeds pertains to specific types of life insurance, and accident and health insurance. See Sections 101, and 104, and 105 of the 1954 Code.

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